

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

IN RE:)
)
THOMAS JOSEPH CAHILLANE,) CASE NO. 04-65210 JPK
) Chapter 7
 Debtor.)

GORDON E. GOUVEIA, TRUSTEE,)
)
 Plaintiff,)
)
 v.) ADVERSARY NO. 05-6144
)
TC INVESTMENTS, LLC, CHARLES R.)
SPARKS, and RONALD K NABHAN,)
)
 Defendants.)

ORDER ON LIMITED MOTION TO ALTER AND AMEND
MEMORANDUM DECISION ("TRUSTEE'S MOTION")

This matter is before the court on the Trustee's/Plaintiff's Limited Motion to Alter and Amend Memorandum Decision (record entry #114) [supported by a memorandum filed as record entry #115], and the defendants' Response to Plaintiff's Limited Motion to Alter and Amend Memorandum Decision (record entry #157).

In his motion, the Trustee seeks to obtain an amendment of determinations made by the court with respect to the Defendants' Motion to Reject Executory Contract or in the Alternative to Lift the Automatic Stay, consolidated for the purposes of decision into the motion for summary judgment filed by the defendants on February 28, 2008. The Trustee's Motion is based on Fed.R.Bankr.P. 9023/Fed.R.Civ.P. 59(e).

The court first notes that the determination to which the Trustee's Motion is directed is not a final judgment. The matters addressed by the memorandum of decision resolved fewer than all claims asserted by the parties, and thus was not a final judgment with respect to any matter determined therein; Fed.R.Bankr.P. 7054(a)/Fed.R.Civ.P. 54(b). Thus, by its express

terms Fed.R.Civ.P. 59(a)(2) and Fed.R.Civ.P. 59(e) have no applicability to the relief sought by the plaintiff because no “judgment” has as yet been entered by the court. The court deems the plaintiff’s motion to be a request to revise the determination previously made by the court pursuant to Fed.R.Civ.P. 54(b). As stated in *Rothwell Cotton Company v. Rosenthal & Company*, 827 F. 246, 251 (7th Cir. 1987) [amended 835 F.2d 710]:

In *Keene Corp. v. International Fidelity Insurance Co.*, 561 F. Supp. 656 (N.D. Ill. 1982), *aff’d*, 736 F.2d 388 (7th Cir. 1984), the court gave a helpful summary of the law governing motions to reconsider:

Motions for reconsideration serve a limited function: to correct manifest errors of law or fact or to present newly discovered evidence. Such motions cannot in any case be employed as a vehicle to introduce new evidence that could have been adduced during pendency of the summary judgment motion. The nonmovant has an affirmative duty to come forward to meet a properly supported motion for summary judgment ... Nor should a motion for reconsideration serve as the occasion to tender new legal theories for the first time.

Motions for reconsideration under Rule 54(b) are determined essentially by the same standards as are motions under Fed.R.Civ.P. 59(e). Thus, they are not a vehicle to re-present previously rejected arguments, or to advance new legal theories which were not originally presented; *Janky v. Lake County Convention & Visitors Bureau*, 2006 WL 2771019 (N.D.Ind) [*reversed in other part* by 576 F.3d 356 (7th Cir. 2009); *Cert. Den.* 130 S.Ct. 1740 (2010)].

The gist of the Trustee’s Motion is that in determining that the bankruptcy estate of Thomas J. Cahillane in case number 04-65210 had rejected a contractual arrangement, the court erred in its implicit finding that the contract deemed by the court to have been rejected was a valid contract.

The contract at issue is a document entitled “Operating Agreement of TC Investments, LLC”, on its face dated December 30, 2003, and entered into on its face among Thomas J. Cahillane, Charles R. Sparks and Ronald K. Nabhan. This document was the subject of a

Motion to Reject Executory Contract or in the Alternative Lift of Automatic Stay filed by the defendants on February 16, 2007. By order entered on March 23, 2007, the court consolidated determination of that motion with determination of the Motion for Summary Judgment filed by the defendants on February 28, 2008. Section H of the court's Memorandum of Decision Concerning Defendants' Motion for Summary Judgment states the court's determination with respect to the defendants' motion in relation to the contract at issue.

On March 8, 2007, the Trustee filed an objection to the defendants' February 16, 2007 motion. In that objection, the Trustee argued that the underlying contract was not valid, and in addition argued that even if it was a contract, there were no significant obligations left to be performed by the parties under it, and that it was therefore not an executory contract.

In the decision to which the Trustee's Motion is directed, the court did not decide the status of the contracting parties in relation to the contract, based upon a record which the court determined to leave open the question of whether the contract was entered into by Thomas J. Cahillane individually with respect to property in which he had an interest individually, or whether the contract was entered into among Thomas J. Cahillane, Charles R. Sparks and Ronald K. Nabhan with respect to property held by TC Investments, LLC. The court's determination proceeded on the theory that the actual status of the contracting parties in relation to the subject matter of the contract was irrelevant to the defendants' motion to deem the contract rejected by the bankruptcy estate. The court determined that the contract had been rejected by the Chapter 7 Trustee by operation of 11 U.S.C. § 365(d)(1) – no matter by whom the contract had been entered into in relation to interests of the Chapter 7 estate. For the purposes of determining the matters addressed by the foregoing Memorandum of Decision, whether or not the contract was valid didn't matter, and the status of the parties in relation to the contract parties didn't matter. Whatever, the contract was rejected pursuant to § 365(d)(1). The result of this determination is that there is no interest in this contract which the Chapter 7

Trustee can enforce for the benefit of the estate.

The Trustee's Motion proceeds on the theory that the court should have first determined that the contract was invalid and unenforceable, and that therefore any determination of rejection under § 365(d)(1) was moot. This is the error of law which the court deems the Trustee to advance.

The factual issues in relation to the formation of the contract at issue were addressed in the defendants' summary judgment submission (record entry #90), specifically by paragraph 21 of the defendants' statement of material facts, which incorporated affidavits of Thomas Cahillane, John A. Schmaltz, Ronald Nabhan and Charles Sparks. The following respective paragraphs of those affidavits asserted the underlying validity of the contract at issue: (Cahillane affidavit, ¶ 27; Schmaltz affidavit, ¶ 25; Nabhan affidavit, ¶ 13; and Sparks affidavit, ¶ 11). Paragraphs/Statements numbers 19 through 21, and 24-25 of the defendants' supplemental statement of material facts (record entry #90) asserted the validity of the underlying agreement/contract. The Trustee's response in his Trustee's Statement of Genuine Issues consisted of a simple denial of these statements, and no evidence of any kind was tendered by the Trustee to support a contention that the underlying contract was invalid.

In the Objection to Motion to Reject Executory Contract, or Alternatively, to Lift the Automatic Stay, the Trustee asserted in paragraph 17 that the "Movants have not established the existence of an executory contract under § 365 of the Bankruptcy Code", and in paragraph 18 asserted that "the contract alleged by Movants to be executory is not valid and may not be enforced". However, when we came to the motion for summary judgment which determined the defendants' motion, in his Memorandum in Support of Response to Defendants' Motion for Summary Judgment, the Trustee argued only that the contract was not an executory contract, and there was no contention that the document at issue was not in fact a valid contract. The court's decision was based upon the memoranda of the parties with respect to the defendants'

motion for summary judgment, and the Trustee waived any argument that the underlying contract was not valid by his failing to raise that issue, and by his argument that the contract was simply not executory. He cannot now raise an issue which was not previously argued with respect to the summary judgment motion, under the guise of Rule 54(b).

Paragraph 30 of the Limited Motion to Alter and Amend Memorandum Decision requests that the court's determination "be amended and clarified to provide that genuine issues of material fact exist with respect to whether the Disputed Operating Agreement is an executory contract for purposes of § 365(d) of the Bankruptcy Code". The plaintiff's memorandum submitted in support of the Trustee's Motion is essentially directed to the argument that the contract is invalid, and that in order to determine whether or not it should have been rejected, the court should have first determined whether or not it was valid; the plaintiff Trustee contends that the contract was not valid. In a certain sense, the result contended for by the plaintiff is exactly the result of the court's decision. The result of the Trustee's argument as to invalidity of the contract is that there is no contract in which the bankruptcy estate of Thomas J. Cahillane may assert any interests. The result of the court's decision regarding rejection of whatever contract there may have been is the same: the bankruptcy estate has no enforceable rights with respect to the contract. The Trustee asserts that he should have no enforceable rights because the contract is invalid; the court decided that the Trustee has no assertable rights because the contract was rejected. In this context, any "error" asserted is harmless error, and leads to the denial of the Trustee's Motion. In any event, the contract is no longer an issue with respect to the interests of the bankruptcy estate in it, under any theory.

The court determines as follows:

1. To the extent the Trustee's Motion seeks relief under Fed.R.Bankr.P. 7023/ Fed.R.Civ.P. 59, the motion is denied: the court's determination to which the motion is

addressed is not a final judgment subject to the foregoing rules.

2. To the extent the motion seeks revision of the court's determination pursuant to Fed.R.Bankr.P. 7054(a)/Fed.R.Civ.P. 54(b), the Trustee's Motion is denied.

Dated at Hammond, Indiana on December 6, 2010.

/s/ J. Philip Klingeberger
J. Philip Klingeberger, Judge
United States Bankruptcy Court

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